IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation, *Plaintiff in Error,* vs. GERTRUDE WRIGHT and ORENE WRIGHT and ORA WRIGHT, by GERTRUDE WRIGHT, their Guardian *ad Litem,* *Defendants in Error.*	No. 2942.

PETITION FOR REHEARING

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The Southern Pacific Company, plaintiff in error, prays for a rehearing in this case, upon the ground that the majority opinion of this Court is in error in holding that the question as to whether the deceased, George R. Wright, was guilty of such contributory negligence as to preclude a recovery by his heirs was a question of fact for the jury.

The salient facts are not in dispute. The deceased was in the drayage business at the town of Salem, and apparently both for the purpose of trying out

an auto truck with a view to its purchase, and to make certain transfers, he applied to the owner, Phelan, for the use of the truck in question. Phelan assented, upon the condition that one Tucker, an experienced chauffeur, should drive the truck and "demonstrate" it, and that Wright should pay for its use at the rate of $15.00 per day. With this understanding, the truck was put into service on May 22d, and at about nine o'clock in the morning Tucker, with the deceased sitting in the seat, on the right side, drove the truck southerly for about a quarter of a mile along a road running parallel with the railroad track, and then turned to make the crossing. The passenger train from the north was about due, and as he turned he looked in that direction but could see no train, although the track was plainly exposed to view for approximately 1500 feet. Up to this time his speed had been about six miles an hour, but as he made the turn, a distance of about 145 feet from the main track, he slowed down to three or four miles, and, proceeding at that speed, and looking down the track to the south for trains from that direction, he passed over the first and second tracks, and was just about to go upon the main track, when, again looking to the north, he saw the passenger train somewhere between two and four hundred feet away, coming rapidly. He made an effort to increase his speed, but not soon enough, for the engine struck the rear end of the truck, overturning it, and injuring him and killing Wright.

No evidence was introduced by the railroad company and it may therefore be assumed that the evidence introduced by plaintiff justifies the claim that the train was running at a speed of between thirty and forty miles per hour, without bell or whistle, in violation of an ordinance limiting the speed to eight miles an hour, and requiring the sounding of a bell or the blowing of a whistle.

It is quite true, as stated in the majority opinion of this Court, that "it is a matter of common experience that passengers in a vehicle trust to the driver to avoid the ordinary dangers of the road". It may also be true that generally it is the wisest course, if not the duty of the passenger to sit still and say nothing; that any other course is fraught with danger, and that "in the long run the greater safety lies in letting the driver alone." It may also be freely conceded that "interference by laying hold of an operating lever or by exclamation or even by direction or inquiry is generally to be deprecated." With these general observations of the Court we have no quarrel.

Upon the other hand, it is also true that if one wilfully or negligently permits another to place him in a place of danger without protest or warning, or permits another to place them both in a situation of danger, he is equally responsible for the consequences. It is in fact as much the duty of the pas-

senger to warn the driver of an approaching danger which the driver may not perceive as it is the duty of the driver to avoid such danger when it has been discovered. If the danger is one which is apparent to the passenger, and there is nothing in the circumstances that would make a word of warning inadvisable, every moral consideration as well as sound law would require the passenger to warn the driver, unless the passenger is assured that the driver is already aware of the danger. Unless he has such assurance the passenger should speak. He cannot blindly assume that the driver has the knowledge that he, the passenger, possesses. In such circumstances the passenger is as much the keeper of the driver's safety as he is of his own. The man who would permit another to unconsciously walk or ride in front of an approaching train without warning, when he was in a position to give such warning, would be culpable in the extreme, regardless of his relations to the one in jeopardy.

It will be observed that we have said it is the duty of the passenger to speak "when there is nothing in the circumstances that would make a word of warning inadvisable." There are instances where words of warning by the passenger might be inadvisable. Upon the crowded public highways where conditions change with bewildering rapidity, and the attention of the driver is absorbed by varying conditions requiring instant decision and action, it is doubtless true, as stated in the opinion of the Court, that gen-

erally it is the wisest course, if not the duty of the passenger, to sit still and say nothing; that any other course is fraught with danger and that "in the long run the greater safety lies in letting the driver alone." Likewise emergencies may confront the driver in other circumstances when his attention should not be distracted by warning or advice from his passenger.

Such conditions did not, however, exist in the case at bar. Wright sat in the same seat with the driver. As is pointed out in the dissenting opinion, Wright was on the right side of the seat of the driver and had a better view than the driver. If Wright had turned his eyes in the direction from which the train was coming, he could have seen it and could have warned Tucker, the driver, that it was coming in ample time to avoid any possible danger. It was about nine o'clock on a clear May morning in a small country town. It is not claimed that traffic or any other condition made driving hazardous or difficult. There was no emergency of any kind. The truck had to cross two side tracks before it could reach the main track upon which the train was coming. It was traveling at the rate of three or four miles an hour. It had to travel seventy-five feet from the time it started to cross the first side track before reaching the center of the main track. During all this time the coming train was in full view. The main track was in fact exposed to view for

approximately 1500 feet while the auto-truck was 145 feet from the track and the train must have been in view while the truck was traveling this 145 feet.

There is, we repeat, no conflict as to the foregoing facts. They are shown by the testimony of Tucker, the driver of the truck, who testified as a witness for the plaintiff. He was 145 feet from the main track when he made the turn toward the track. (Transcript p. 35) He got a clear vision as far as the oil station and a little further, which satisfied him that no train was coming from the northeast. (p. 39) From where the accident occurred to the oil tanks was about 1400 feet. (p. 35) He then looked the other way (p. 39). When he looked again to the northeast his truck was going on to the main track. The train was then coming from the northeast and was only three hundred or four hundred feet away. (p. 39) It was then too late to avoid the collision. (p. 40) It was a bright May day. No wind was blowing. There was no unusual noise to distract his attention at the time he made the crossing. (p. 42) Mr. Wright was seated with him on the right side. When he made the turn toward the track he slowed down to three of four miles an hour. When he started to make the turn—"I looked first towards the oil tanks to see that there was no train coming. I looked up the track and did not see any train coming and from

that time proceeded on my way and never looked in the same way again to see if there was a train passing until I passed a clear vision of the packing house. I was practically on the main track and looked and saw the train coming on us." (pp. 43-4) "The view was not obstructed in any way. The only thing there was to obstruct our vision, if it can be an obstruction, were some telegraph poles. *The whole space there was unobstructed and there was no reason why if I had looked I couldn't have seen the train approaching.* I am sure Mr. Wright's eyesight was good. It was good so far as I know, and his hearing was good." (p. 44)

The packing house referred to was to the southeast and did not interfere with his vision in the direction from which the train was coming (p. 39) which was coming from the northwest. (p. 40)

Thus, according to the testimony of the driver himself, he had an unobstructed view of the track for at least 1400 feet when he was 145 feet from the track. He further testified that "as he came nearer the line of the track, the main line where the accident occurred, I could see further and further up the main track, so before I reached the main track there was nothing to obscure my vision for miles up the track, except the poles, that I remember." (p. 45)

There can be no question that Tucker's contributory negligence was as a matter of law sufficient

to preclude a recovery by him upon his own testimony. (*New York Cent. Ry.* vs. *Maidment,* 168 Fed. 23, 99 C. C. A. 415; *Brommer* vs. *Pennsylvania Ry.,* 179 Fed. 577; *Partridge* vs. *Boston Ry. Co.,* 184 Fed. 211; *Northern Pac. Ry.* vs. *Tripp,* 220 Fed. 286; *Erie Ry. Co.* vs. *Hurlburt,* 221 Fed. 907; *Hall* vs. *West Jersey Ry. Co.,* 244 Fed. 104; *Herbert* vs. *Southern Pacific Co.,* 121 Cal. 227; *Green* vs. *Southern Cal. Ry.,* 138 Cal. 1; *Green* vs. *Los Angeles Ry.,* 143 Cal. 31; *Larabee* vs. *Western Pac. Ry. Co.,* 161 Pac. 750; *Martz* vs. *Pacific Electric Ry.,* 161 Pac. 16; *Arnold* vs. *S. F.-Oakland Terminal Ry.,* 164 Pac. 798; *Basham* vs. *Southern Pacific Co.* (Oct. 17, 1917), 168 Pac. 359.)

Wright was in exactly the same situation as Tucker. If anything he had a better view of the track than Tucker as he sat on the seat with Tucker on the side from which the train was coming. His eyesight and hearing were good. His attention was not distracted in any way. He was not even talking to Tucker. (p. 43) He was not engaged in driving the truck and his undivided attention could have been given to his surroundings. The fact that he did not see the approaching train while the truck was traveling at a slow rate of speed 145 feet from the turn in the road to the track, or if he did see it did not see fit to warn Tucker so obviously demonstrates his own personal negligence in the premises that argument would seem to be unnecessary, un-

less it is to be held that the fact that Tucker was driving, and Wright was not, absolved Wright from any legal duty to take the slightest care for either his own personal safety or the safety of his companion.

In the majority opinion of this Court, it is held that Wright and Tucker were not engaged in a joint or common enterprise, and that their relation was substantially the same as the ordinary relation between passenger and cab driver, and that under such circumstances Wright was responsible only for his own conduct, not for Tucker's.

It seems to us that under the facts and authorities cited in the brief of plaintiff in error, the relation between Tucker and Wright was not that of the ordinary relation between passenger and cab driver. Wright had rented the truck and had secured Tucker's services partly to "demonstrate" the truck, as Wright was contemplating buying it, and partly to enable Wright, who was in the drayage business, to make certain transfers with the truck. At the time of the accident, the truck was loaded with distillate which was being hauled for Wright. (p. 33) Their relation was that of principal and agent, or master and servant, rather than of a passenger and cab driver, and if we are correct as to this, Wright was responsible for Tucker's negligence as well as his own.

This question is, however, immaterial, if we are correct in our contention that even if the relation between Wright and Tucker be conceded to be such that Wright was responsible only for his conduct, Wright was nevertheless bound to exercise ordinary care for his own safety.

The fundamental principle underlying all these cases is that one cannot recover damages for injury to the commission of which he has directly contributed, and as stated by the United States Supreme Court in *Little* vs. *Hackett,* 116 U. S. 371, "It matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which if performed would have prevented it. If his fault, whether omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong."

This rule, as we shall see, applies to a passenger in an automobile as well as to the driver. The law fixes no different standard of duty for him than for the driver. Each is bound to use reasonable care. What conduct on the passenger's part is necessary to comply with his duty must depend upon all the circumstances. It may very well be that the conduct required to fulfill that duty on the part of the passenger may be different from that of the driver because his circumstances are different. His duty,

however, continues. Thus in *Parmenter* vs. *McDougall,* 172 Cal. 306, the Court said:

> "As we said in *Thompson* vs. *Los Angeles, etc., R. Co.,* 165 Cal. 748, (134 Pac. 709), after declaring that the negligence of the chauffeur of an automobile was not to be imputed to the plaintiff, a passenger in the automobile, 'it is, of course, true that a passenger in a vehicle operated by another is bound to exercise ordinary care for his own safety.' Likewise, in the Fujise case, cited above, the Court of Appeal said that 'the rule (that the negligence of the driver is not imputed to the passenger) 'does not absolve the passenger or guest from the duty of using ordinary care for his own safety. No one can be allowed to shut his eyes to danger in blind reliance upon the unaided care of another, without assuming the consequences of the omission of such care.' The same principle is declared in *Bresee* vs. *Los Angeles Traction Co.,* 149 Cal. 131, (5 L. R. A. (N. S.) 1059, 85 Pac. 152), and has been applied by courts of other jurisdictions in many cases, a few of which we cite. (*Adler* vs. *Metropolitan St. R. Co.,* 84 N. Y. Supp. 877; *Davis* vs. *Chicago, etc., R. Co.,* 159 Fed. 10, (16 L. R. A. (N. S.) 424, 88 C. C. A. 488); *Walsh* vs. *Altoona, etc., R. Co.,* 232 Pa. St. 479 (81 Atl. 551); *Ewans* vs. *Wilmington City R. Co.,* 7 Penne. (Del.) 458, (80 Atl. 634); *Wachsmith* vs. *Baltimore & O. R. Co.,* 233 Pa. St. 465, (Ann. Cas. 1913B, 679, 82 Atl. 755); *Brommer* vs. *Pennsylvania R. Co.,* 179 Fed. 577, (29 L. R. A. (N. S.) 924, 103 C. C. A. 135); *Trumbower* vs. *Lehigh Valley T. Co.,* 235 Pa. St. 397, (84 Atl. 403); *City of Vincennes* vs. *Thuis,* 28 Ind. App. 523, (63 N. E. 315); *Bush* vs. *Union Pac. R. Co.,* 62 Kan. 709, (64 Pac.

624); *Brickell* vs. *New York, etc., R. Co.,* 120 N. Y. 290 (17 Am. St. Rep. 648, 24 N. E. 449); *Canter* vs. *City of St. Joseph,* 126 Mo. App. 629, (105 S. W. 1)."

This is also the rule in the Federal Courts. (*Davis* vs. *Chicago Ry. Co.,* 159 Fed. 10; *Rebillard* vs. *Minneapolis Ry. Co.,* 216 Fed. 503; *Brommer* vs. *Pennsylvania R. Co.,* 179 Fed. 577; *Hall* vs. *West Jersey Ry. Co.,* 244 Fed. 104.)

In *Davis* vs. *Chicago Ry. Co.,* 159 Fed. 10, plaintiff was a guest of the driver and they were traveling together in companionship in the driver's vehicle on a mission of mutual interest, the plaintiff having as much right as the driver to direct their course. The Court said:

> "Under the facts of this case, the relation that plaintiff sustained to his companion, Pfeutze, did not permit him to sit dumb and inert in the vehicle, taking no heed of a known danger, permitting Pfeutze to drive him into a pitfall or onto a deadly railroad track, implicitly trusting his life and limbs to the discretion of his companion, without a word of warning or protest. It is now the better recognized rule of law that as to such a person situated as was the plaintiff, riding in a vehicle in mere companionship with his friend, engaged upon a mutual adventure, it is as much his duty as that of the driver to take observations of dangers, and to avoid them, if practicable, by suggestion and protest. In other words, he is required to exercise ordinary care to avoid injury."

In *Birckell* vs. *New York R. Co.,* 120 N. Y. 290) 24 N. E. 449, 17 Am. St. Rep. 648, it is said (italics ours):

> "The rule that the driver's negligence may not be imputed to the plaintiff should have no application to this case. Such rule is only applicable to cases where the relation of master and servant or principal and agent does not exist, *or where the passenger is seated away from the driver by an inclosure, and is without opportunity to discover danger and to inform the driver of it.* It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver to learn of danger, and to avoid it if practicable."

This is quoted with approval in *Davis* vs. *Chicago Ry. Co., supra,* the Court adding that this rule is supported by persuasive authority, citing a number of cases.

In *Rebillard* vs. *Minneapolis Ry. Co.,* 216 Fed. 503, the Court refers to the rule that the contributory negligence of the driver of a public conveyance would not be imputed to a passenger, but adds that "an examination of the many cases on that question shows that the writers of the opinions are careful to except a passenger or guest who with knowledge of the danger remains in such dangerous position." The opinion also quotes with approval from *Brickell* vs. *New York Ry. Co., supra,* the statement that the rule that the driver's negligence may not be imputed to the plaintiff is only applicable to cases where the

relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver by an enclosure and is without opportunity to discover danger and to inform the driver of it.

The distinction thus drawn between the duty of a passenger who is seated in the front seat with the driver and one who is seated in a rear seat is important, and has not been lost sight of by the courts. Thus in *Brommer* vs. *Penn. Ry. Co.,* 179 Fed. 577, the opinion dealt with three cases which were tried together and so argued on appeal. Brommer was driving an automobile over a railroad crossing when it collided with a train. In the automobile were Mr. and Mrs. Henderson and Mrs. Blockson, all of whom Brommer had invited to ride with him. Mrs. Henderson was killed and the other three occupants injured. These three brought suits. The trial Court held Brommer guilty of contributory negligence and directed a verdict against him. Verdicts were recovered by Henderson and Mrs. Blockson. Brommer appealed from the judgment against him and the railroad company likewise appealed from the judgment in favor of Henderson and Mrs. Blockson.

The Circuit Court of Appeals, Third Circuit, affirmed the judgment against Brommer, the driver, upon the ground that he was clearly guilty of contributory negligence. It reversed the judgment in favor of Henderson, who sat on the front seat with

Brommer, upon the ground that Henderson was equally culpable with Brommer, but affirmed the judgment in favor of Mrs. Blockson, who sat in the back seat of the automobile, and who was not in as good a position to see the approaching train as the others, upon the ground that, under the state of the proof, the Court had no facts upon which it could say, as a matter of law, that Mrs. Blockson was guilty of contributory negligence. Speaking with reference to Henderson, who was in the seat with the driver, the Court said after quoting from *Little* vs. *Hackett, supra:*

> "It follows, therefore, that Henderson was under obligations to take due care of his own safety. He was not a passenger for hire. He was engaged in the common purpose of a pleasure ride with the driver of the machine. He knew they were approaching a railroad crossing. Being free from the engrossing work of operating the machine, and occupying a seat beside the driver, he was in an even better situation than Brommer to look out for the safety of the machine. His own safety and the instinct of self-preservation should have led him to do so."

In *Hall* vs. *West Jersey Ry. Co.,* 244 Fed. 104, the plaintiff was a passenger on the front seat of the auto in which she and six others were taking a pleasure ride. The auto ran into the side of an electric train which was passing on a grade crossing. Three women were on the front seat of the car. The

woman who was driving was killed. Plaintiff sat on the knee of the second woman who was on the front seat. The Court, after quoting from the decision in *Brommer* vs. *Pennsylvania R. Co., supra,* said, "Under such circumstances there was no disputable issue. The evidence simply showed the plaintiff and the unfortunate person who was driving the car took no care or precaution whatever and blindly went forward, the one to her death and the other to her distressing accident, in such a careless and negligent way that they contributed to the accident. * * * The fact that they went ahead, and that the auto ran into the train, simply shows that the persons on the front seat did not look, but went ahead without any precaution, and for an auto to attempt to pass, without precaution, a grade crossing, where a view of the track is obstructed, is chancing a crossing and chancing danger is not due care."

In the case at bar there was nothing to obstruct the view. As the driver himself testified, " I could see further and further up the main track", as he approached the track, "so before I reached the main track there was nothing to obscure my vision for miles up the track except the poles, that I remember." (p. 45)

In *Colorado Ry. Co.* vs. *Thomas,* 33 Colo. 517, 3 Ann. Cas. 700, both the driver and his companion

were riding in a buggy and were struck and killed at a railroad crossing at night. The Court held that while the negligence of the driver was not imputable to his companion, the latter was responsible for his own conduct in the premises, which in the circumstances of the case the Court held was grossly negligent and contributed directly to produce the unfortunate casualty, and accordingly reversed the judgment in his favor entered in the trial Court. In its opinion the Court called attention to the fact that the plaintiff was upon the seat with the driver, with the same knowledge of the road, the crossing and environments, and with at least the same if not better opportunity of discovering dangers that the driver possessed, and that "the testimony is wholly to the effect that the plaintiff committed himself voluntarily to the action of Fields, that he joined him in testing the danger, and that he is responsible for his own act."

So in the case at bar it appears without conflict that the deceased was familiar with the crossing and its environments. He had been in the truck business in that locality for a number of years. (Transcript p. 69)

In *Caminez* vs. *Brooklyn R. Co.,* 127 App. Div. N. Y. 138, it is held that one who was sitting on the seat of a truck with the driver is injured by a collision with a car and admits that he paid no attention to the car and did not look up and down while cross-

ing the track and took no care to avoid an accident is, as a matter of law, guilty of contributory negligence. In this case, as in the present case, the plaintiff was seated upon the seat of the truck alongside of the driver.

In *Allyn* vs. *Boston Ry. Co.,* 105 Mass. 77, plaintiff testified that he did not know of the crossing and did not look up, and that the driver was careful and the horse safe, but there was no evidence that the driver looked to ascertain whether a train was coming. It is held that there was no evidence before the jury that the plaintiff was in the exercise of due care.

In *Miller* vs. *Louisville Ry. Co.,* 128 Ind. Rep. 97, the wife was riding in a wagon with her husband who was driving. Her husband attempted to cross in front of a train and both were killed. It was held that the wife in failing to warn the husband or to look or listen for approaching trains was guilty of contributory negligence and that there could be no recovery for her death.

In *Lake Shore Ry. Co.* vs. *Borts,* 16 Ind. App. Rep. 640, it was held that where one is riding in a vehicle as the guest of the driver, it is no less his duty than it is the duty of the driver when approaching a railroad crossing to look and listen to learn of danger and avoid it if practicable, and if he gives

no notice to the driver he is guilty of such contributory negligence as will prevent a recovery by him.

In *Missouri Ry. Co.* vs. *Bussey,* 66 Kan. 735, it was held that the fact that the plaintiff had no control over the vehicle, the horse, or the driver, did not relieve her from her obligation to look and make some effort to avoid the danger, and that as she did not do so she was guilty of contributory negligence as a matter of law.

In *Klinczyk* vs. *Lehigh Valley Ry. Co.,* 152 App. Div. N. Y. 270, it is held that although the intestate was not driving the vehicle, but was seated at the side of the driver, he may be charged with contributory negligence, where he had the more convenient view of the approaching train, and was superior in authority to the driver, so that he could have ordered him to stop. In this case the Court said:

> "True, plaintiff's intestate was not driving; but his apparent authority was superior to that of the driver, for he was foreman of their common employer. He was seated on the side of the wagon from which the best and most convenient view could be had of the approaching train. The horse stopped and started up, not suddenly, but at the same easy walk at which it had previously gone. A word of warning or a touch upon the reins would have stopped the horse while still in a place of safety and the accident would have been averted."

So in the present case, Wright was unquestionably superior in authority to the driver. The latter

was engaged upon Wright's business. At the time of the accident the truck was hauling distillate for Wright. A word of warning from Wright to the driver at any time before they reached the main track would have been sufficient.

In the majority opinion of this Court it is said, speaking with reference to Wright's situation:

> "Can we say as a matter of law that he failed to use the degree of care for his own safety which an ordinarily prudent person would have exercised? If so, in what respect was he careless? What did he leave undone, that he should have done?"

The answer to this is that the railroad tracks were there as a warning of danger and that Wright should have seen the approaching train and have called the attention of Tucker thereto before they reached the track. Paraphrasing the language of the Court in *Davis* vs. *Chicago Ry. Co.,* 159 Fed. 10, Wright could not sit dumb and inert in the vehicle, taking no heed of a known danger, permitting Tucker to drive him into a pitfall or onto a deadly railroad track, implicitly trusting his life and limbs to the discretion of his companion without a word of warning or protest. The overwhelming weight of authority is to the effect that in such circumstances it is no less the duty of the passenger, where he has the opportunity to do so, than of the driver to learn of danger, and to avoid it if practicable.

In the majority opinion it is further said:

> "We are not advised whether Wright saw the train or not as soon as it came into view, a quarter of a mile away, or before it was seen by Tucker. He might have seen it and yet reasonably have remained silent, for he might naturally have assumed that, the view being unobstructed, Tucker saw it, too, and was governing himself accordingly. So that up to the very time that the truck approached the main track he may have reasonably supposed that Tucker would stop the car in time to avoid a collision. And when he realized that he was going to attempt to cross ahead of the train, what could he do or what should he have done? Who can now say as a matter of law? Cry out? He might thus have confused and disconcerted the driver, and an instant of indecision in such a case may be fatal. Here with the truck a half a second sooner or the train a half second later, the tragedy would not have happened. It must be borne in mind that there was no time to reflect or reason. If the train was running only thirty miles an hour—the speed was probably greater—it was only about thirty seconds from the time it came into view a quarter of a mile away until it crashed into the truck."

We submit, with great deference, that the foregoing reasoning is in conflict with the overwhelming weight of authority that "no one can be allowed to shut his eyes to danger in blind reliance upon the unaided care of another, without assuming the consequences of the omission of such care." (*Parmenter* vs. *McDougall,* 172 Cal. 306, and cases cited.)

Paraphrasing the language of the Circuit Court of Appeals, Third Circuit, in *Brommer* vs. *Pennsylvania R. Co.,* 179 Fed. 577, Wright knew they were approaching a railroad crossing. Being free from the engrossing work of operating the machine, and occupying a seat beside the driver, he was in an even better situation than Tucker to look out for the safety of the machine. His own safety and the instinct of self-preservation should have led him to do so. In the language of the Court in *Hall* vs. *West Jersey R. Co.,* 244 Fed. 104, there was under the circumstances in this case no disputable issue. The evidence simply shows that the plaintiff and Tucker, who was driving the machine, took no care or precaution whatever and blindly went forward, the one to his death and the other to his distressing accident, in such a careless and negligent way that they contributed to the accident. They both chanced the crossing, and "chancing danger is not due care."

The statement in the opinion that "it must be borne in mind that there was no time to reflect or reason" and that "it was only about thirty seconds from the time the train came into view, a quarter of a mile away, until it crashed into the truck", overlooks the fact that a period of thirty seconds is ample time within which to perceive and guard against the danger of a collision with an approaching train. The train could have been seen at any time during the time that the truck was traveling 145 feet from

the turn in the road to the main line track. Assuming that this distance could be traveled at the rate of four miles an hour in thirty seconds, it is obvious that any person of ordinary intelligence would have had ample time to perceive the danger and to have stopped the truck. It was not a matter which required reflection for any substantial length of time, but that thirty seconds is in itself sufficient time for anyone to determine what should be done in a case of that character can be easily demonstrated by ascertaining what thirty seconds in point of time actually means.

It may very well be that when Wright realized that Tucker was going to attempt to cross ahead of the train it was too late to cry out, but this will not aid Wright, who should have discovered and warned Tucker of the situation before it became perilous. The perilous position that existed when they had reached the track was the result of their own negligence, and one cannot create a cause of action in his own favor by reason of his own negligence. As was said by the Court in *Richfield* vs. *Michigan Central R. Co.,* 110 Mich. 406:

> "The rule was settled in that case that where, by the negligence of the defendant, the plaintiff was put in a place of danger, and if, in an attempt to extricate himself from it, he did not take the best hazard, he would not be charged with contributory negligence. This, as we understand it, is as far as the rule extends. In the

present case, however, there is not a particle of showing that the women exercised the least care in approaching this crossing. They were familiar with the streets and the crossing, and yet drove along, laughing and talking, and apparently giving no heed to the approach of a train. If they had been exercising any care, they would have heard or seen what others saw and heard. They were not drawn into a position of peril by the negligence of the defendant, but, by their own negligence, had placed themselves in such a position, and, being there, took their chance of crossing in front of the train. We think the Court should have directed a verdict in favor of the defendant."

In *Lake Shore Railway Co.* vs. *Miller,* 25 Mich. 274, the plaintiff was in a lumber wagon driven by one Eldridge. They were struck by a train at a railroad crossing, which they attempted to cross without either taking any precaution. After stating the facts the Court adds:

"Comment can add nothing to such a state of facts. No logic can find in it, or extract from it, the faintest manifestation or idea of that reasonable care or common prudence which the circumstances demanded in approaching the crossing. Without necessity, and of their own accord, they move heedlessly into danger, and meet destruction, equaling in courage, excelling in composure, the immortal six hundred at Balaklava; but in care and circumspection, rivaling only the commander who ordered that 'rash and fatal charge.' "

After citing a number of authorities the Court adds:

> "That such failure, under such circumstances, to make use of any means to ascertain whether a train is approaching, before venturing upon the track, must of itself be pronounced negligence, as matter of law, is a proposition as sound in principle as it is well supported by authority. The laws of nature and of the human mind, at least such of them as are obvious to the common apprehension of mankind, as well as the more obvious dictates of common sense and principles of human action—which are assumed as truths in any process of reasoning by the mass of sane minds—constitute a part of the laws of the land, and may, and must, be assumed by the Court, without being found by a jury; indeed, the finding of a jury, which should clearly disregard them, should itself be disregarded by the Court. In other words, Courts are bound judicially to know and apply such laws and principles as part of the law of the land. They are bound to know that there is a difference between *reasonable care* and *no care at all,* or utter negligence, and that a prudent man, in the presence of danger, naturally and ordinarily makes some use of his faculties to ascertain and avoid it; and if, upon any occasion, he does not, when he has good reason to apprehend danger, he does not exercise the ordinary or reasonable care demanded by the circumstances."

In the case at bar the undisputed facts lead to the inevitable conclusion that no care whatever was exercised by Wright when they approached the crossing. The irresistible inference is that like Tucker,

he did not look at all from the time they made the turn toward the crossing until it was too late. If he did look he could have seen the train in ample time to warn Tucker of the danger and every instinct of self-preservation would have impelled him to give such warning. If he did look and yet failed to warn Tucker, his negligence was all the more culpable. In either event he was, as a matter of law, guilty of such contributory negligence as to preclude any recovery by his heirs.

In the dissenting opinion filed by Judge Hunt in this case, it is stated that under the undisputed facts and circumstances it should have been held that Mr. Wright as well as Mr. Tucker failed in the duty to exercise ordinary and proper care for his own safety and by his omission to do so directly contributed to cause the accident. Judge Hunt was further of the opinion that "nevertheless, whether or not the engineer actually saw the truck, and observing its movements saw the peril of the men, was guilty of omission to use the means at his hand to give timely warning, and if necessary slow down and thus avoid collision with the truck and injury to the men in it, was for the jury to determine. *Grand Trunk Ry. Co.* vs. *Ives,* 144 U. S. 408; *Fluckey* vs. *Southern Ry. Co.,* 242 Fed. 468. But as the District Court expressly charged the jury that the "last clear chance doctrine" had no application, the jury was precluded from considering the phase of the case just referred to.

As the trial Court expressly charged the jury that the "last clear chance doctrine" had no application, this question was not discussed in the brief of Plaintiff in Error in this Court, except in the incidental reference thereto in the additional authorities cited by Plaintiff in Error quoting the decision of the Supreme Court of California in *Basham* vs. *Southern Pacific Company,* 168 Pac. 359. This decision was cited primarily for the purpose of showing that the negligence of Tucker and Wright was sufficient, as a matter of law, to preclude any recovery by them.

In the case at bar there was no evidence whatever introduced showing that the engineer or the fireman was guilty of any negligence after they had actual knowledge of the danger in which Tucker and Wright had placed themselves. The rule of "last clear chance" is not based upon opportunity by the exercise of common prudence to observe the danger in which another has placed himself, but upon actual knowledge of such peril. The Supreme Court of California has held, again and again, that even where the motorman or engineer has by gross negligence omitted to keep an outlook which might have resulted in his discovery of the plight of a person on or near the track, that fact may not avail the negligent person injured. (*Starck* vs. *Pacific Electric Ry.,* 172 Cal. 277 and cases cited; *Basham* vs. *Southern Pacific Co.* (Cal.), 168 Pac. 359). It is

also there stated that the persons operating the train have the right to presume that the other party will exercise his faculties and use reasonable care for his own safety, and that it is a matter of common knowledge that both pedestrians and vehicles will approach close to a track before stopping, and that it is not until the party approaching the track is in actual danger and the engineer or the fireman become aware of such danger that they are required to take any steps to prevent a collision. *Starck* vs. *Pacific Electric Ry. Co., supra; Basham* vs. *Southern Pacific Co., supra.*

In the case at bar the uncontradicted evidence shows that when the auto-truck reached the main line track the train was somewhere between two hundred and four hundred feet away, coming rapidly. Up to this time both the engineer and fireman had the right to assume that the truck would stop before reaching the track. When it did reach the track it was obviously too late to avoid the accident through any efforts on the part of the trainmen. The burden of proof of showing that the accident could have been avoided by the trainmen after plaintiff had thus placed himself in a situation of peril was on the plaintiff (*Basham* vs. *S. P. Co.,* supra), but as there was no evidence whatever introduced showing that the accident could have been avoided by the trainmen after the truck had reached the track, and as all the established facts are clearly to the contrary,

there was nothing which would justify the submission of this question to the jury, and the trial Court was not in error in so ruling.

This case is important not only to the Southern Pacific Company, but to all railroad companies, because of the increasing frequency of accidents at railroad crossings due to the carelessness of automobile drivers and those accompanying them. It is, we think, a matter of common knowledge that in practically every accident at a railroad crossing witnesses can be found who will testify that they did not hear the bell or whistle, so that the question as to the company's negligence in such cases will always be a question of fact for the jury, and if the decision in this case is to stand it will mean that in no crossing case can it be held that the passenger's contributory negligence was sufficient, as a matter of law, to preclude a recovery of damages; for we can conceive of no case where the admitted facts could establish a clearer case of contributory negligence than the facts in the case at bar.

It is respectfully submitted that a rehearing should be granted.

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We hereby certify that the foregoing petition is well founded and is not interposed for delay.

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